

**Cour
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**International
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Court**

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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Public redacted version of "Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0877", 26 May 2016, ICC-01/04-02/06-1335-Conf

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Office of the Prosecutor (“Prosecution”) requests that Trial Chamber VI (“Chamber”) admit into evidence the prior recorded testimony of Witness P-0877 under rule 68(3) of the Rules of Procedure and Evidence (“Rules”).
2. Specifically, the Prosecution seeks to admit Witness P-0877’s two statements, five sketches annexed to these statements, and seven entries of the witness’s notebook, pursuant to rule 68(3) of the Rules as part of his testimony. These documents are relevant and Witness P-0877 will be asked to confirm their accuracy at the beginning of his testimony.¹
3. Witness P-0877 will be the sixth witness to testify during the fifth evidence block, which is scheduled to commence on 6 June 2016. As such, the Parties and Chamber will have the opportunity to examine this witness in the course of these proceedings. The admission of the prior recorded testimony of Witness P-0877 will not be prejudicial to the rights of the Accused.
4. The admission of the prior recorded testimony of Witness P-0877 will enhance the expeditiousness of the proceedings by reducing the length of his in-court testimony. Should this application be granted, the Prosecution intends to conduct a brief supplementary examination of Witness P-0877, as provided for under rule 68(3), to elicit limited, focused *viva voce* evidence after Witness P-0877 has confirmed the accuracy of his prior recorded testimony.

¹ ICC-01/04-02/06-619, para.43.

Confidentiality

5. The filing is classified as Confidential pursuant to regulation 23*bis* (1) of the Regulations of the Court because it contains confidential information relating to a Prosecution witness. The Prosecution will file a public redacted version of this filing.

Prosecution's Submissions

6. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber where the individual does not object, and the Parties and Chamber have the opportunity to examine the witness. The Prosecution considers that Witness P-0877 is an appropriate witness for the procedure under rule 68(3), which is consistent with the Chamber's guidance for the Prosecution to identify additional witnesses, including Witness P-0877, to whom this procedure may apply.²
7. In its Decision on the conduct of proceedings, the Chamber ordered that the calling party file an application with copies of the previously recorded testimony, identifying the precise passages it wishes to tender into evidence, and other materials referred to in these passages that are available to the calling party and, without which, the passages would not be understandable.³
8. Accordingly, attached as Annex A to this application, is a list of the materials that the Prosecution seeks to admit into evidence under rule 68(3). This list sets out the passages of Witness P-0877's two witness statements⁴ that the

² Email from the Chamber to the Parties and participants on 4 May 2016 at 13:11.

³ ICC-01/04-02/06-619, para.42.

⁴ DRC-OTP-2069-2086 and DRC-OTP-2077-0118.

Prosecution seeks to admit, five sketches⁵ by Witness P-0877, which are annexed to these statements, and seven entries of his notebook, which are recorded on three of its pages.⁶

9. Also listed in Annex A to this application is one other document, which is necessary to understand Witness P-0877's prior recorded testimony, namely Witness P-0877's screening note.⁷ The Prosecution does not seek the admission of this document.
10. In his statements, Witness P-0877 provides information on, *inter alia*: the first Mongbwalu attack; the pillaging by UPC soldiers of [REDACTED]; the murder of two Lendu civilians [REDACTED]; the [REDACTED]; the capture by UPC soldiers of Lendu prisoners and their disappearance; the murder of a [REDACTED] civilian [REDACTED]; the recruitment of children by the UPC in [REDACTED], including [REDACTED]; finding a pit with several dead bodies near a UPC/FPLC camp [REDACTED]; seeing several dead bodies in Kobu in March 2003.
11. The Prosecution is seeking to admit the majority of Witness P-0877's statements into evidence under rule 68(3) of the Rules. This statement contains limited standard redactions to identifying and contact information of his family members and innocent third parties, to the location at which the interviews took place, and to the names of Prosecution staff who are based in or travel frequently to the field.

⁵ DRC-OTP-2069-2095, DRC-OTP-2069-2096, DRC-OTP-2069-2097, DRC-OTP-2077-0127 and DRC-OTP-2077-0128.

⁶ DRC-OTP-2077-0140, at 0206, 0210 and 0213, with the corresponding portions of the transcription of the notebook (DRC-OTP-2081-0507, at 0574, 0578 and 0581) and its translation (DRC-OTP-2081-0589, at 0657, 0661 and 0664). The Prosecution will also request the admission into evidence of these portions of the notebook's transcription and translation.

⁷ DRC-OTP-2069-0096.

12. These statements were voluntarily given by Witness P-0877.⁸ He attested to them being true to the best of his recollection and knowledge.⁹ They are relevant and reliable. Further, Witness P-0877 will be asked to confirm the accuracy of his statements, the sketches annexed to them, and the seven entries of his notebook, which are recorded on three of its pages.¹⁰
13. The admission of Witness P-0877's prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused. The Prosecution intends to call Witness P-0877 to provide *viva voce* testimony. As such, the Parties and the Chamber will have the opportunity to examine this witness during the proceedings and he will confirm whether he consents to the admission of his materials, in accordance with rule 68(3) of the Rules.

Proposed procedure for the introduction of prior recorded testimony

14. Should this application be granted, the Prosecution submits that there will be no need to read Witness P-0877's statement into evidence as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any, to his statement and the accompanying sketches.
15. During witness preparation, the Prosecution will ask Witness P-0877 to review his prior statements, advise of any corrections or clarifications he wishes to make to these materials, and then to confirm their accuracy.¹¹ In accordance with the Witness Preparation Protocol this session will be video-recorded and the Prosecution will disclose a log of the session clearly indicating any changes or corrections the witness makes.¹²

⁸ DRC-OTP-2069-2086, para. 3 and DRC-OTP-2077-0118, para. 3.

⁹ DRC-OTP-2069-2086, at 2093 and DRC-OTP-2077-0118, at 0120, para. 13 and at 0126.

¹⁰ ICC-01/04-02/06-619, para.43.

¹¹ ICC-01/04-02/06-652-Anx, page 4, paras. 18-19.

¹² ICC-01/04-02/06-652-Anx, page 4, paras. 14-15 and page 6, paras. 31-32.

16. To enhance expeditiousness of his in-court testimony, the Prosecution proposes that it be permitted to use leading questions to elicit from the witness any corrections or clarifications identified during witness preparation, asking him to confirm that he wishes to make a particular change and asking him to explain the reason for the change or clarification.
17. After tendering his prior recorded testimony into evidence, with any changes or clarifications noted on the record, the Prosecution will then conduct a brief supplementary examination of Witness P-0877 to ask limited questions and to solicit specific, focused aspects of his evidence *viva voce*, in accordance with rule 68(3) of the Rules. This examination will ensure that the key aspects of his evidence are suitably explored through a non-leading examination by the Prosecution, which will ensure that the Chamber is able to fully assess these aspects of his evidence with a greater degree of clarity and reliability.

Specific areas of Witness P-0877's evidence to be provided *viva voce*

18. Following the introduction of his prior recorded testimony, the Prosecution seeks to be permitted to ask Witness P-0877 limited clarification questions, as well as specific, focused questions to explore what the Prosecution has identified to be the critical aspects of his testimony. This supplementary examination will be brief. Other Chambers of this Court have permitted supplementary questioning after the introduction of the prior recorded testimony.¹³ Trial Chamber I expressly permitted the Prosecution to

¹³ Trial Chamber I permitted the Prosecution to admit the prior recorded testimony of three witnesses (by way of written statements, transcripts of in-court testimony and associated documents) and then to ask necessary supplementary questions in the course of the *Lubanga* proceedings (P-0043 and P-0293: ICC-01/04-01/06-1603, para. 25; P-0046: ICC-01/04-01/06-T-205-Red3, page 14, l.16 to page 19, l.9 (introduction of prior recorded testimony) and page 19, l.11 ss (supplementary questioning)). In *Katanga & Ngudjolo*, Trial Chamber II similarly permitted the Prosecution to admit certain portions of Witness P-0030 and P-0002's prior recorded testimony (ICC-01/04-01/07-2233-Corr, paras. 16-17 (P-0030) and ICC-01/04-01/07-2289-Corr-Red, page 17 (P-0002)), and allowed the Prosecution to ask supplementary questions to the witnesses (ICC-01/04-01/07-2233-Corr, paras. 16-17, ICC-01/04-01/07-T-176-Red-ENG (P-0030,

supplement the admission of prior recorded testimony of witnesses present before the Chamber (under this rule) with “any necessary questioning.”¹⁴

19. In particular, Witness P-0877 is expected to provide direct evidence about the UPC’s [REDACTED], including important eye-witness evidence relevant to the Prosecution’s charges of murder and persecution in that location. He will also testify about seeing the Accused [REDACTED]. Witness P-0877 is the only crime based witness who will be able to give *viva voce* testimony about the UPC’s crimes [REDACTED]. Indeed, the Prosecution’s two other crime-based witnesses of the UPC’s [REDACTED] are Witnesses [REDACTED] and [REDACTED]. Witness [REDACTED] is deceased and her evidence has already been admitted by the Chamber under rule 68(2)(c).¹⁵ As for Witness [REDACTED], the Prosecution intends to submit a request for the admission of the entirety of his prior recorded statement and does not intend to conduct a supplementary examination of this witness. Accordingly, the testimony of Witness P-0877 will be the only opportunity for the Chamber to hear *viva voce* direct evidence from a crime-base witness about this aspect of the Prosecution’s charges against the Accused. The Prosecution will elicit this particular aspect of his evidence through non-leading questions and in a manner that ensures Witness P-0877’s testimony is provided in sufficient detail and with the greatest degree of clarity.

20. Accordingly, the Prosecution is not seeking to tender those portions of Witness P-0877’s witness statement that relate to this specific evidence, but will rather conduct a focused examination of the witness to obtain this specific evidence *viva voce*.

questioned by Prosecution from page 23), ICC-01/04-01/07-T-184-Red-ENG (P-0002, questioned by Prosecution from page 24).)

¹⁴ ICC-01/04-01/06-1603, para. 25.

¹⁵ [REDACTED].

21. This supplementary questioning will be brief and focused and come within the time estimate provided by the Prosecution of one and a half hours for examination-in-chief.¹⁶

Request

22. The Prosecution requests that the Chamber admit the two witness statements of Witness P-0877, the five sketches annexed to these statements, as well as seven entries of the witness's notebook, listed in Annex A to this application, as prior recorded testimony pursuant to rule 68(3) of the Rules.



Fatou Bensouda
Prosecutor

Dated this 4th day of July 2016
At The Hague, The Netherlands

¹⁶ In accordance with ICC-01/04-02/06-619, para.16, the Prosecution provided a Forthcoming Witness List by email on 10 May 2016, in which it estimated that the examination-in-chief of Witness P-0877, including the required procedure under rule 68(3) of the Rules for the admission of his prior recorded testimony, would be completed in 90 minutes.